Carcer Enim Ad Continendos Non Puniendos Haberi Debetur

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Abstract: In this paper, we attempt to highlight the condition of prison, as well as the purpose for applying preventive measures involving deprivation of liberty and punishment, in a historical exploration of this institution of criminal law and procedural law. This study aims at revealing, alongside this historic exploration of the evolution of the punishment system within the criminal process, additional elements which, even though regulated since ancient times, can still be found in the current criminal and procedural regulations.

Keywords: punishment; incarceration; prison; historical development; criminal principles

1. Preliminary Issues

Ulpian's famous words are widely known: "carcer enim ad continendos non puniendos haberi debetur", meaning that prison ought to be employed for confining men, not for punishing them.

The criminality phenomenon is inherent to every society, and the fight carried out by the legal authorities, regardless of their attributions or name, against this phenomenon can be easily identified with the evolution of the society itself. In time, different concepts have taken shape about the role, justification and individualisation of punishment with respect to those that came into conflict with those social values that had to be protected. Thus, different criminal doctrines emerged, starting with the classical school of thought that left its mark on the evolution of the criminal policy.

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According to the positivist conception (Lombroso, 1992), the purpose of punishment was to protect society against the attacks of the criminal; taking this idea further, to the extreme, the positivists compared punishment with a curative therapy, adequate for each category of criminals, applied to patients in hospitals and other treatment facilities. For the positivists, the criminal sanctions, construed both as punishment and as a safety measure, was meant mostly to prevent organic or psychological anomalies or dysfunctions of the social environment that influenced the criminal and made him or her commit antisocial acts. The decisive element in the application of sanctions was the identification of the dangerous nature of the perpetrator, in order to decide on the most appropriate measure of social defence, which could go as far as the physical elimination of the convicted or life imprisonment. There were no concerns about the gravity of the action or the guilt of the convicted, but only about the extent to which the convicted was dangerous, and his or her action was construed as a symptom of this dangerous nature. The role of the state was to prevent the criminal impulse of the perpetrator; the culpable action was not a foundation, but an opportunity for punishment.

2. Opinions of Classic Founders of Criminal Law Schools of Thought With Regard to the Execution of Punishments

This doctrine dates back to the second half of the 18th Century, and its birth document is Cessare Beccaria's work "Dei delitti e delle pene", published in 1764. The author reveals his ideas about criminal law issues and firmly condemns the punishments and cruelties of the procedural acts. Philosophers of the Enlightenment, such as Voltaire, Diderot, Montesquieu, Rousseau also presented their ideas in the field of law in their approach of general philosophical and political issues.

According to (Beccaria, 2006) and the majority of philosophers in the 17th and 18th centuries, "the origin of the right to punish" can be found in the "social contract". The right to apply punishment is granted to the state, based on the delegation assigned by its members, upon their entering into society, within rigid limits established by laws. This juridical idea can be seen even today in the definition of the legal action outlined by some scholars in the field: the legal action is the expression of a legal authorization (a potestas agendi) based on which the legal conflict that arise from the breach of the juridical regulation can be brought to justice. (Dongoroz, et al., 1969) Furthermore, Beccaria argues that only Law, and

not the judges, can make the clear distinction between the licit and illicit areas and determine the punishments associated with each type of crime. (Beccaria, 2001, p. 106) The type and extent of the punishment to be applied must be in compliance with the provisions of the text of the law that incriminates the act in question. Beccaria sees no reasoning of punishment in the crime itself, but believes that punishment is a method of atonement and therefore does not regard the criminal law, in its entirety, as a system of sanctions of the moral order. Atonement entails a deep understanding of the inner aspects of the act, not only the exterior ones. However, due to the methods of investigations available to him, man is not capable to discover the nuances of guilt, to perceive the torments of consciousness and to determine the just equivalency between the mistake that was made and the extent of expiation. For this reason, the moral law cannot constitute a measure of crime and punishment.

A series of principles conceived and expressed by Beccaria can be traced to the modern criminal procedure laws, as follows:

- the principle of equal treatment before the criminal law – it is an instance in which the principle of the equality of all people before the law in applied, referring to convicted persons, for which the state must regulate, through norms, the implementation of this principle, as their right. Such norms must address the regulation of the conduct of a certain category of persons and must aim, as an ultimate goal, to increase the efficiency of the educational human activity;

- the principle of the provision of punishment in the positive law (by law) – constitutes a legal guarantee that the person who has committed an illicit action or lack of action will bear, as a result of the sanction applied, only the consequences provided by law. This principle must establish with precision the form and extent of the criminal punishment, its function and position within the framework of repressive methods. This principle derives from the necessity to provide and defend, by law, individual rights, and the conditions of their limitation, as argued by Beccaria. Accountability for infringements of the law or failure to observe obligations provided by law is enforced afterwards; it is required, initially, to know the rights which the person in question has.

According to the classic doctrine, the social utility is the foundation on which punishment is grounded. The purpose of punishment and incarceration "is not to torment a sensible being, nor to undo a crime already committed", but it is "to prevent the criminal from causing any further injury to society and to prevent

others from committing similar ofences". These guiding principles were the source of the functions played by prisons, among which there is the function to isolate criminals from the rest of society or the function to set examples, by the sanctions applied and the incarceration of the perpetrator of a crime, so that other members of the society know the "response" of the judicial authorities to the infringement, without any right, of a protected social value.

- punishment must not be retributive, intimidating or vindicative in nature - this is another principles that allows to resolve conflicts. The exclusion of retributive punishment means that such punishment must not be seen as the "price" that a person must paid for a prejudicial action. The judicial norm should provide a punishment that reflects a balance between the gravity of the prejudicial action and its consequences. We highlight here the manifestation of this principle in a condition stipulated in the current criminal procedural regulation with respect to the preventive arrest decided against the defendant, specifically that there must be a proportionality between the preventive measure and the gravity of the accusation charged against the defendant, in order to achieve the goal to which such measure aims. (Neagu, 2014)

Additionally, the classic doctrine stipulates that (Djuvara, 1943), in order to ensure justice, a balance must exist between these elements and the consequences born by the convicted person, who should not suffer an injustice, but at the same time the victim and society must be satisfied with the punishment applied to the perpetrator. By excluding the vindicative nature of punishment, the victim and the state should not pursue revenge, which would further generate other vengeful actions and infringements of the law, but the administration of justice;

- exclusion of physical punishment, torture, elimination or limitation of the death penalty, in case of very serious offences, constitutes the principle of criminal severity, which represents the quintessential nature of sanction and punishment. This principle constitutes the foundation of social rehabilitation, as any punishment consisting in deprivation of liberty must ensure a maximum of educational efficiency, and the reformed behaviour of the convicted individual should be in the best interest of the society;

- the principle of the uniqueness of punishment requires that every offence is sanctioned by one punishment, even when there is a direct relation between the actions or inactions under consideration;

- the principle of the administration of evidence requires that judgement is based on the evidence examined and is public, in order to prevent abuse. The oath taken by the delinquent is not relevant, as it is in contradiction with the subjective assessment of one's own conduct.

3. Historical Considerations Concerning the Punishment Execution System in the Romanian Law

In Pravila of 1646, sentence to the mines, prison, galley, jail, dungeon are listed as places where punishment can be served (Code of Law, 1652, gl 348 zac 37), and, as previously mentioned, the abbey, where convicted nobles used to go. On the other hand, "when the judge or the law quarrel with somebody with money", the punishment consisting the payment of a fine was applied without bias due to the social standing, and both "the nobleman and the poor man" were equal before the law (Romanian Book of Learning, pravila 15, list 70, Glava 62 zac 2). Following on the footsteps of the byzantine legislation, in time only the code of law could decide the punishment (according to Caragea Law, VI, 3 § 3; The Criminal Book art. 173). We emphasise that in the Caragea Law the preoccupation to humanise criminal repression is noticeable.

The sentence to the galleys does not have a place within the imprisonment system in the Romanian principalities. (Floca, 1993) In literature (Alecsandri, 1998, p. 116), Vasile Alecsandri (From a Bibliophile's Album) mentions this punishment: "In the Chronicles, we find the phrase 'noble relation', synonym with aristocrat. Such noble relations enjoyed the privilege of not being subject to punishment by sentence to the galleys or incarceration; instead, for small mistakes, they were banished from their lands for a while. For more serious offences, they were beheaded". The execution of criminal punishments remained the first attribution of the legal and administrative officer of the court, and the judge was not allowed to have a prison of his own (title 15 art. 8). In the Command issued in 1741 by C. Mavrocordat to his sub-prefects, we note the rulers' preoccupation about the reform of the prison system. Thus, the sub-prefects could no longer hold at the same time the position of judges and that of tax collected (application of fines – according to the Book of Law (***, 1957, pp. 80-81), and they could only collect the fines applied to robbers provided that there was a court decision issued for that (enforceable disposition would be the modern definition of the term). The reason for this was that the sub-prefects did not have any jurisdictional competence in

matters of murders and robberies. High treason was judged by the ruler, in his divan (council). The sentence to jail was also issued only by the ruler (Stoicescu, 1969; Georgescu & Strihan, 1981, p. 8) and the sub-prefects were forbidden to collect abusively prison taxes (taxes for the liberation from jail), which was the obligation of other court officials, such as the great legal and administrative official or the great sword-bearer. Those sent to the mines were hopeless, because nobody could escape the pits, no matter how short the detention, and it was physically impossible to survive for more than five years. (Dvoracek, 1984, p. 354)

The order was constantly breached, until the Organic Regulations (Uric II, 205, Anaphora of 12 April 1827). The obligation to guard the inmates was the responsibility of the legal and administrative officer of the court. He was charged with the task to ensure the protection of the prison so that no convicted might escape, and had in subordination the jailor, the bailiff, and the guards (N. Iorga, Studies and Documents, XXII, pp. 29 sqq). In Fotino's Manual, dated 1766, in the chapter about court offices (§ 4), it was stipulated that they had the obligation to check, on Sundays and holidays, that all prisoners were well fed and treated humanely. This disposition, inspired by the byzantine legislations, is also found in the Legal Manual of Andronachi Donici (title 2, chapter 18). In 1804, the prince Constantin Ipsilanti noted that the prisoners were deprived of food and heating and were forced to beg from noblemen and traders. At the same time, Al. Ipsilanti banned the fine and replaced it with beating.

After the Organic Regulations, the Prisons Rules were drafted at the time when the great legal officer was replaced by the Master of Prisons. (Zidaru, 2001, p. 61) Relevant testimonies concerning the manner in which punishments were executed and imprisonment conditions from the aforementioned period are taken from several documents issued at that time – the "Bandinus" codex of 1646, the description provided by the Archdeacon Paul of Aleppo, who had travelled to the Romanian principalities between 1650 – 1660 as a companion of Patriarch Macarius of Antioch, Descriptio Moldavie of 1775. According to the notes included in these documents, punishments were very strict, both in Moldova and in Muntenia, and more often than not death penalty was applied: "Detention preceded death, because those who were sent to prison rarely escaped with their life. Those arrested were thrown into pits and dungeons and deprived of any care. Those sent to the mines would never see the light of day again." (Zidaru, 1997, p. 61) In the dungeons of the ruler's court there were not only thieves, but also noblemen who had conspired against the ruler.

The merits of the Codes of Law of Vasile Lupu in Moldova (1646) and Matei Basarab in the Principality of Wallachia (1652) consisted in that they enforced certain principles of law, by written laws, and established sanctions for criminal offences discovered. In the codex that bears his name, the missionary Bandinus, who had been present during the judgement held by the court council in 1646, praises the impartiality and fairness of the royal judgement, showing that, before Vasile Lupu, not even the greatest nobleman would prevail a peasant. He had punished two of his half-brothers on his mother side by sentencing them to 3 days in prison because of their "wrong doings". Proportionality of punishments with the acts committed, which reflected a modern conception about the execution of punishments, was introduced, as a novelty, by Constantin Mavrocordat who also established a committee of noblemen in charge to take measures against bands of thieves. During that time, until the implementation of the Organic Regulations, both in Muntenia and in Transylvania, prisons were under the authority of the great legal officer of the court. For a long time, prisons remained in the same primitive state, specifically they were pits and dungeons in which prisoners were thrown in huddles and without the slightest care. Gradually, some measures were applied by royal decree concerning prisons, but they related more to the guarding of prisons, and not to change the circumstances of those detained in the royal dungeons or the jails in the cities or incarcerated in villages. For the first time in the history of punishments, the idea of executing them based on certain criteria of separation were introduced by Nicolae Mavrogheni, ruler of Muntenia (1786- 1790). He ordered that "women should not be imprisoned in the same place as men, and, if prison does not allow for such a separation, they should be imprisoned with a good married man, if the village jailor is not married." (Zidaru, 2001, p. 60) With respect to those in preventive detention, the same ruler decided that they must be judged as soon as possible, and should not be detained in preventive arrest for more than four days. Alexandru Moruzi, ruler of Moldova, and also of Muntenia, introduced the obligatory labour of inmates in factories, in order to pay the compensations of those convicted for small debts. Mihail Şuţu was another ruler who continued the efforts for reformation and modernisation of the prison system. He requested to be presented regularly information about those imprisoned, alongside their personal files, and ruled that no person could be sent to the mines without his personal written order. Moreover, he introduced the conditional freedom, which was, at the time, a very modern method, a precursor of today's conditional release from prison. At that time, all inmates were made to perform public work, they were

treated more humanely and new prisons had been built, with more rooms, where the inmates slept on the floor, on rugs, with their legs tied.

In Transylvania, information about the beginnings and the organisation of the prison system is found in the book "Deprivation of liberty in feudalism in Hungary". According to this, there was a significant increase in the building of prisons at the end of the 18th century and the beginning of the 19th century as a result of the aggravation of uprisings amidst the Romanian population against those who had dispossessed them of their lands. Upon the request of the Hungarian aristocracy, prisons were built in the capitals of all counties in Transylvania. As a specific feature, almost all prisons in Transylvania were build in the shape of the letter "M", the initial of Maria Theresa, who had adopted the same style of construction for all prisons in the Austrian-Hungarian Empire. At the beginning of the 19th century, it can be argued that the prison system underwent genuine progress, both in Moldova and in Muntenia.

Following the Organic Regulations, a new imprisonment system is established in both Romanian principalities. Prisons are transferred under the authority of the court master in Muntenia, and in Moldova they remained under the subordination of the legal officer. (Barbu & Serban, 2005) Disciplinary punishments are introduced for recalcitrant inmates or attempted escapes. Also, punishments are provided for guards guilty of work negligence. In the entire Principality of Wallachia there were 6 prisons; two of them, in Bucharest and Craiova, were correctional facilities, and the other four were called punishment prisons – Giurgiu and Braila for reclusion and Telega and Ocnele-Mari for forced labour, either limited or for life. Besides these prisons, there were other 14 county jails. In Moldova there were 13 county jails; in Iasi, there was also the police arrest, and in Targu Ocna a forced labour prison. Grigore Ghica modernised the prison system in Moldova. (Zidaru, 2001, pp. 62-63) In 1862 the Prison Service is organised, by Regulation approved by royal decree. This Regulation established the conformity with the existing Criminal Law. It provided a classification of prisons as follows: preventive, correctional for convictions of 6 days to two years, reclusion to forced labour in mines, for life or temporary, reclusion to easier forced labour, correctional for youth (from 8 to 20 years), reclusion for women of all categories. The circumstances for the execution of punishments involving deprivation of liberty was established in detail, based on modern principles. The system thus enforced was maintained for 12 years, until king Carol I drafted the Prison Law in 1874, based on the mixed cell system and the establishment of prisons for underage

inmates. In 1927 new regulations were prepared establishing the Guards Corps, for the purpose of ensuring prison security.

The reform movement in the prison system initiated at the beginning of the 20th century lead to the adoption, in 1929, of the Law on the organisation of prisons and preventive institutions. With this law, the idea of removal from society as a result of the offences committed is replaced, for the first time, with the idea to attempt re-education, and the definitive isolation is provided only for those that could not be rehabilitated, for abnormal cases or psychopaths. This law enforced the individualisation, based on all specific features, of each convicted person, in correlation with separation, in order to obtain the best effects of the re-education process. The principle of professional specialisation based on skills was also present.

4. Conclusions

Throughout history, punishment was a method to sanction people. These sanctions were a consequence of infringement of conduct rules imposed by the community in which the perpetrators lived. Infringement of such conduct rules has been construed as deviant behaviour. However, these deviant behaviours are addressed differently from one community to another. For some communities, a certain type of conduct can be regarded as deviation, and for other the same conduct is considered normal. The same can be said about the manner in which punishment was perceived and the evolution of this perception from one historical period to the next and from one civilisation to another. Almost in the entire history of mankind, punishment was focused on inflicting physical mutilation and eventually death. People's conception about punishment changed as a result of the bourgeois revolutions in Europe and the spreading of the French ideas of the Enlightenment and the adaptation of the "Declaration of the rights of Man and of the Citizen" (26 August 1789).

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